



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215 and 252

[Docket DARS-2018-0008]

RIN 0750-AJ19

Defense Federal Acquisition Regulation Supplement: Only One Offer (DFARS Case 2017-D009)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to partially implement a section of the National Defense Authorization Act for Fiscal Year 2017 to address the requirement for certification of cost or pricing data and potential submission of additional certified cost or pricing data when only one offer is received in response to a competitive solicitation.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2017-D009, using any of the following methods:

- o Federal eRulemaking Portal: <http://www.regulations.gov>. Search for "DFARS Case 2017-D009." Select "Comment Now" and follow the instructions provided to submit a comment. Please include "DFARS Case 2017-D009" on any attached document.
- o Email: osd.dfars@mail.mil. Include DFARS Case 2017-D009 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately 2 to 3 days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to partially implement section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328) to (1) address the potential requirement for certification of cost or pricing data

and potential requirement for additional certified cost or pricing data when only one offer is received in response to a competitive solicitation and (2) make prime contractors responsible for determining whether a subcontract qualifies for an exception from the requirement for submission of certified cost based on adequate price competition. This DFARS rule supplements the rule proposed under FAR Case 2017-006, Exception from Certified Cost or Pricing Data Requirements-Adequate Price Competition, which proposes to modify the standards for adequate price competition at FAR 15.403-1(c) for DoD, NASA, and the Coast Guard (83 FR 27303, June 12, 2018). Section 822 requires that for DoD, NASA, and the Coast Guard, adequate price competition requires a price that is based on adequate competition that results in at least two or more responsive and viable offers from independently competing offerors.

II. Discussion and Analysis

A. Current DFARS.

DoD published a final rule in the Federal Register on June 29, 2012 (77 FR 39126) to address acquisitions using competitive procedures in which only one offer is received (DFARS Case 2011-D013). That rule was initiated to implement one of the aspects of the initiative on promoting real competition that was presented by the Under Secretary of Defense for Acquisition, Technology, and Logistics in the November 3, 2010, memorandum

entitled, "Implementation Directive for Better Buying Power - Obtaining Greater Efficiency and Productivity in Defense Spending." The rule created a new section at DFARS 215.371 and a provision at DFARS 252.215-7008, both entitled "Only One Offer." The provision requires that an offeror agree to submit additional cost or pricing data if the contracting officer notifies the offeror that only one offer was received in response to a solicitation, and additional cost or pricing data are required in order to determine whether the price is fair and reasonable or to comply with the statutory requirement for certified cost or pricing data (10 U.S.C. 2306a and FAR 15.403-3).

B. Proposed changes.

1. Exception at FAR 15.403-1(b).

Once it has been determined that only one offer was received, the exception to the requirement for certified cost or pricing data based on adequate price competition at FAR 15.403-1(b)(1) can no longer apply. Therefore, cross references to FAR 15.403-1(b) are limited to the other exceptions at paragraphs (b)(2) through (5) of that section (see DFARS 215.371-3(a) and (b) and 252.215-7008(a)(2)).

2. Standard at FAR 15.403-1(c)(1)(ii) and DFARS 215.371-3(a).

When there is a reasonable expectation of competition, but only one offer is received, FAR 15.403-1(c)(1)(ii) allows in

limited circumstances, with approval at a level above the contracting officer, a determination that the proposed price was based on adequate price competition and was reasonable. Without such determination, certified cost or pricing data would be required for acquisitions that exceed the threshold for obtaining certified cost or pricing data, unless another exception at FAR 15.403-1(b) applies. This limited exception, based on a determination at a level above the contracting officer, is no longer applicable to DoD. Therefore, DFARS 215.371-3(a) is removed.

3. Requirements at DFARS 215.371-3(b).

The requirements at DFARS 215.371-3(b) are streamlined (proposed as DFARS 215.371-3(a) through (d)), with additional emphasis on the requirement to obtain certified cost or pricing data when only one offer is received. The introductory text is also revised to exempt contracts valued at or below simplified acquisition threshold.

4. Prescriptions at DFARS 215.408.

The prescription at DFARS 215.408(3)(i) for DFARS provision 252.215-7008 is also being revised to exempt contracts valued at or below simplified acquisition threshold and remove the reference to the exceptions at DFARS 215.371-4(a), which are not applicable to the requirement to obtain certified cost or pricing data. In addition, paragraph (3)(ii) of the

prescription is removed; the requirement to use the provision at DFARS 252.215-7010 (previously FAR 52.215-20) in solicitations that include DFARS 252.215-7008 is relocated to the prescription for DFARS 252.215-7010 at DFARS 215.408(5).

5. Streamlining DFARS 252.215-7008.

DFARS provision 252.215-7008 covers the requirements for when only one offer is received in response to a DoD solicitation, but also contains much of the same text as FAR provision 52.215-20, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, because this provision was prescribed for use in lieu of the FAR provision. However, on January 31, 2018, DoD published a final rule in the Federal Register (83 FR 4431) under DFARS Case 2016-D006, Procurement of Commercial Items, which prescribes the use of a new DFARS provision 252.215-7010, Requirement for Certified Cost or Pricing Data and Data Other than Certified Cost or Pricing Data (Basic and Alternate), in lieu of the provisions at FAR 52.215-20, of the same title. DFARS 252.215-7010 now also contains much of the same text as FAR 52.215-20, as well as DoD specific requirements based on statute. Since DFARS 252.215-7010 is always used when 252.215-7008 is included in a solicitation, DFARS 252.215-7008 is streamlined to only address requirements for when only one offer is received in response to

a DoD solicitation by removing all text now covered by DFARS 252.215-7010.

6. Responsibility of offeror with regard to subcontractors.

In addition, a new paragraph is added to DFARS 252.215-7010 (basic and alternate), to state that the offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost on the basis of adequate price competition.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Items, Including Commercially Available Off-the-Shelf (COTS) Items

This rule does not create a new provision, but amends the existing provisions at DFARS 252.215-7008 and 252.215-7010. Although the existing provisions apply to solicitations for the acquisition of commercial items (including COTS items), the changes due to this rule do not impact the acquisition of commercial item, including COTS items, because the rule retains the exceptions to the requirements for certified cost or pricing data relating to acquisition of commercial items. In addition, DFARS 252.215-7010 already applies to contracts valued at or below the SAT, while DFARS 252.215-7008 does not.

IV. Executive Orders 12866 and 13563.

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory

alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This final rule is not subject to E.O. 13771, Reducing Regulation and controlling Regulatory Costs, because this rule is not a significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis has been prepared and is summarized as follows:

The reason for this rule is to further implement section 822 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328) to (1) address the potential requirement for

certified cost or pricing data when only one offer is received in response to a competitive solicitation, if no other exception to the requirements for certified cost or pricing data applies; and (2) make prime contractors responsible for determining whether a subcontract qualifies for an exception from the requirement for submission of certified cost based on adequate price competition. This DFARS rule supplements the rule proposed by DoD, GSA, and NASA under FAR Case 2017-006, which proposes to modify the standards for adequate price competition at FAR 15.403-1(c) for DoD, NASA, and the Coast Guard.

The objective of this rule is to implement the new and more restrictive standard for "adequate price competition" as the basis for an exception to the requirement to provide certified cost or pricing data. The statutory basis is 10 U.S.C. 2306a, as amended by section 822 of the NDAA for FY 2017. DoD will now be required to obtain certified cost or pricing data from an offeror when only one offer is received and no other exception applies.

According to data for FY 2016 from the Federal Procurement Data System, there were 918 noncommercial, competitive new DoD awards valued at greater than \$750,000 (the certified cost or pricing data threshold) that were awarded on the basis of a solicitation that received only one offer. Of the 918 awards, 549 were awarded to small businesses (428 unique small

entities). DoD estimates that of these awards, all would require certification under the new rule, and might also require submission of additional data. With regard to subcontracts, DoD estimates that when certification or additional certified cost or pricing data are requested from the prime contractor, 1386 subcontract awards may be affected, of which 1,505 are awarded to small businesses (1,141 unique small entities). In addition, DoD awarded 839 negotiated contracts and orders valued as more than \$750,000, for which certified cost or pricing data were required. DoD estimates that for each prime contractor providing certified cost or pricing data, there may be an average of one additional competitive subcontract for which certified cost or pricing data will now be required because there is only one offer on that subcontract. DoD estimated that 703 of those subcontracts are awarded to small businesses (504 unique small entities).

The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD was unable to identify any alternatives that would reduce burden on small business and still meet the requirements of the statute. Impact on small businesses is lessened because the requirement for certified cost or pricing data only applies to acquisitions that exceed \$750,000 and there is an exception for the acquisition of commercial items, including COTS items.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2017-D009), in correspondence.

VIII. Paperwork Reduction Act

The rule contains information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35). Accordingly, DoD has submitted a request for approval of a new information collection requirement concerning Only One Offer (DFARS Case 2017-D009) to the Office of Management and Budget.

A. Public Reporting Burden. Public reporting burden for this collection of information is estimated to average about 37.7 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden estimated as follows:

Respondents: 2,079.

Responses per respondent: 1.73, approximately.

Total annual responses: 3,593.

Preparation hours per response: 37.7 hours, approximately.

Total response Burden Hours: 135,330.

B. Request for Comments Regarding Paperwork Burden.

Written comments and recommendations on the proposed information collection, including suggestions for reducing this burden, should be sent to Ms. Jasmeet Seehra at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503, or email Jasmeet_K._Seehra@omb.eop.gov, with a copy to the Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060. Comments can be received from 30 to 60 days after the date of this notice, but comments to OMB will be most useful if received by OMB within 30 days after the date of this notice.

Public comments are particularly invited on: whether this collection of information is necessary for the proper performance of functions of the DFARS, and will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of

information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the Defense Acquisition Regulations System, Attn: Ms. Amy G. Williams, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060, or email osd.dfars@mail.mil. Include DFARS Case 2017-D009 in the subject line of the message.

List of Subjects in 48 CFR Parts 215 and 252

Government procurement.

Amy G. Williams,

Deputy, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215 and 252 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 215 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

2. Revise section 215.371-3 to read as follows:

215.371-3 Fair and reasonable price and the requirement for additional cost or pricing data.

For acquisitions that exceed the simplified acquisition threshold, if only one offer is received when competitive procedures were used and it is not necessary to resolicit in accordance with 215.371-2(a), then—

(a) If no additional cost or pricing data are required to determine through cost or price analysis that the offered price is fair and reasonable, the contracting officer shall require that any cost or pricing data provided in the proposal be certified if the acquisition exceeds the certified cost or pricing data threshold and an exception to the requirement for certified cost or pricing data at FAR 15.403-1(b) (2) through (5) does not apply.

(b) Otherwise, the contracting officer shall obtain additional cost or pricing data to determine a fair and reasonable price. If the acquisition exceeds the certified cost or pricing data threshold and an exception to the requirement for certified cost or pricing data at FAR 15.403-1(b) (2) through (5) does not apply, the cost or pricing data shall be certified.

(c) If the contracting officer is still unable to determine that the offered price is fair and reasonable, the contracting officer shall enter into negotiations with the offeror to establish a fair and reasonable price. The negotiated price should not exceed the offered price.

(d) If the contracting officer is unable to negotiate a fair and reasonable price, see FAR 15.405(d).

3. Amend section 215.408 by—

a. Revising paragraph (3); and

b. In paragraph (5) introductory text, removing “required” and adding “required or when using the provision at DFARS 252.215-7008” in its place.

The revision reads as follows:

215.408 Solicitation provisions and contract clauses.

* * * * *

(3) Use the provision at 252.215-7008, Only One Offer, in competitive solicitations that exceed the simplified acquisition threshold, including solicitations using FAR part 12 procedures for the acquisition of commercial items.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Amend section 252.215-7008 by—

a. Removing the provision date “(OCT 2013)” and adding “(DATE)” in its place;

b. Revising paragraph (a);

c. Removing paragraphs (b) and (d);

d. Redesignating paragraph (c) as paragraph (b); and

e. Adding a new paragraph (c).

The revision and addition read as follows:

252.215-7008 Only One Offer.

* * * * *

(a) After initial submission of offers, if the Contracting Officer notifies the Offeror that only one offer was received, the Offeror agrees to—

(1) Submit any additional cost or pricing data that is required in order to determine whether the price is fair and reasonable or to comply with the statutory requirement for certified cost or pricing data (10 U.S.C. 2306a and FAR 15.403-3); and

(2) Except as provided in paragraph (b) of this provision, if the acquisition exceeds the certified cost of pricing data threshold and an exception to the requirement for certified cost or pricing data at FAR 15.403-1(b) (2) through (5) does not apply, certify all cost or pricing data in accordance with paragraph (c) of provision 252.215-7010, Requirements for Certified Cost or Pricing Data and Data Other Than Certified Cost or Pricing Data, of this solicitation.

* * * * *

(c) Subcontracts. Unless the Offeror is the Canadian Commercial Corporation, the Offeror shall insert the substance of this provision, including this paragraph (c), in all subcontracts exceeding the simplified acquisition threshold defined in FAR part 2.

(End of provision)

5. Amend section 252.215-7010 by—

a. In the basic provision—

i. Removing the provision date of "(JAN 2018)" and adding "(DATE)" in its place;

ii. In paragraph (c), adding new paragraph (3);

b. In the Alternate I clause—

i. Removing the provision date of "(JAN 2018)" and adding "(DATE)" in its place; and

ii. In paragraph (c), adding new paragraph (3).

The additions read as follows:

**252.215-7010 Requirements for Certified Cost or Pricing Data
and Data Other Than Certified Cost or Pricing Data.**

* * * * *

(c) * * *

(3) The Offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, i.e. two or more responsible offerors, competing independently, submit responsive and viable offers in accordance with FAR 15.403-1(c)(1)(ii).

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Alternate I. * * *

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(c) * * *

(3) The Offeror is responsible for determining whether a subcontractor qualifies for an exception from the requirement for submission of certified cost or pricing data on the basis of adequate price competition, i.e. two or more responsible offerors, competing independently, submit responsive and viable offers in accordance with FAR 15.403-1(c)(1)(ii).

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